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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of RICHARD W. GOOD
and CYNTHIA DARIO-GOOD.

RICHARD W. GOOD,

Respondent,

v.

CYNTHIA DARIO-GOOD,

Appellant.

G055618

(Super. Ct. No. 15D010232)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Michael J. Naughton, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.). Affirmed.

The Struck Firm and James D. Struck, for Appellant.

Bohm Wildish & Matsen, Sherry Grahybehl D'Antony and Christine Ulich, for Respondent.

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Cynthia Dario-Good challenges the judgment entered in her divorce case. She contends the trial court was unfairly biased against her; the court improperly awarded her the couple's pottery business and all its debts; the court incorrectly determined she had breached her fiduciary duty to her husband, Richard W. Good; and the court incorrectly determined she earns or is capable of earning \$4,000 net per month. For the reasons set forth below, we find no reversible error and affirm the judgment.

I.

FACTS

Cynthia¹ and Richard were married in 2000 and had a child a few years later. They lived in Modesto.

In 2009, they purchased a "paint it yourself" pottery business, which they named Pottery Magic Modesto. Pottery Magic was set up as a sole proprietorship (as opposed to a corporation or other separate legal entity). Cynthia managed the business almost entirely on her own, while Richard worked at the YMCA.

Because Pottery Magic struggled financially, Cynthia took out several loans over the years to keep it running. She never informed Richard in writing of the business's poor performance, and according to Richard, he was unaware of the business's expenditures.

In March 2015, after 14 years of marriage, Cynthia and Richard separated, and Richard moved to Orange County. A few months later, the couple's daughter moved to Orange County to live with her father.

Richard filed a petition for dissolution later that year. Cynthia filed a response and request for dissolution, in which she asked the trial court to confirm the Pottery Magic business as her separate property. However, she later asserted the business

¹ We refer to the parties by their first names for clarity and ease of reference. We intend no disrespect.

was a community asset with a negative value and asked the court to divide its debts between the parties.

Cynthia and Richard reached an agreement on custody and visitation, but the case went to trial on several other issues, including the division of Pottery Magic and its debts, permanent spousal support, child support, and attorney fees.

In its judgment, the trial court awarded Pottery Magic and its debts to Cynthia, awarded no spousal support to either party but reserved jurisdiction on the issue, ordered Cynthia to pay Richard \$290 per month in child support, and ordered the parties to pay their own attorney fees. Cynthia timely appealed.

II.

DISCUSSION

A. *Judicial Bias*

We begin with Cynthia's contention that the trial court judge was unfairly biased against her.

As a threshold matter, Cynthia forfeited any claim of judicial bias by failing to raise the issue in the trial court. Bias and prejudice are grounds for disqualification of trial judges (Code Civ. Proc., § 170.1, subd. (a)(6)(A)(iii)), but a party seeking to disqualify a judge on this ground must do so "at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification." (Code Civ. Proc., § 170.3, subd. (c)(1).) "This strict promptness requirement is not to be taken lightly, as a failure to comply constitutes forfeiture or an implied waiver of the disqualification." (*Tri Counties Bank v. Superior Court* (2008) 167 Cal.App.4th 1332, 1337.) "The matter cannot then be raised for the first time on appeal." (*In re Steven O.* (1991) 229 Cal.App.3d 46, 54.) "Otherwise, a [party] can sit through a first trial hoping for [a good outcome], secure in the knowledge that he [or she] can invalidate the trial later if it does not net a favorable result." (*Id.* at p. 55.) Because Cynthia never raised the issue of judicial bias during the trial, she forfeited any right to challenge the court or its rulings on

this ground. (*Moulton Niguel Water Dist. v. Colombo* (2003) 111 Cal.App.4th 1210, 1218.)

Further, Cynthia did not assert below or on appeal that the trial court's alleged bias violated her right to due process, much less establish a probability of actual bias too high to be constitutionally tolerable. (See *People v. Freeman* (2010) 47 Cal.4th 993, 996.)

Even if we ignore those problems, we would still find Cynthia's judicial bias argument without merit. Cynthia claims the trial court denied her lawyer's request to recall Cynthia in her case-in-chief, but Cynthia's attorney failed to ask the court for permission, which is necessary to recall a witness. (Evid. Code, § 774.) In exercising its discretion not to allow counsel to recall Cynthia, the court explained counsel could recall her in rebuttal. This ruling does not even hint at any bias, let alone show the actual bias necessary to establish a due process violation. Cynthia also complains the court "interrupted" direct examination of Cynthia "to launch into its own pointed line of questions, without permission from counsel, apparently to prove its own point." Nonsense. Evidence Code section 775 grants courts the power to examine witnesses, and this power does not depend on counsel's permission. Cynthia complains about the court's questions, but her attorney objected to none of the court's questions and therefore waived this issue on appeal.

We have reviewed the entire record, including each challenged judicial action, and the record simply does not support Cynthia's claim of bias. (See *Roitz v. Coldwell Banker Residential Brokerage Co.* (1998) 62 Cal.App.4th 716, 724 [strained relations between judge and attorney do not evidence bias or prejudice].) The experienced trial judge simply exercised reasonable control over the presentation of evidence to provide for the orderly conduct of the proceedings. (See Code Civ. Proc., § 128, subd. (a)(3); Evid. Code, §§ 765, 775.) We therefore reject Cynthia's contention that the court was unfairly biased against her.

B. *Pottery Magic*

Cynthia next challenges the trial court's decision to assign the Pottery Magic business and all its debts to her. According to Cynthia, the court "abdicated its duty to equally divide the community assets and debts" and unfairly saddled her with over \$120,000 in debt.

Absent an agreement by the parties, a trial court must determine the value of the community estate's assets and liabilities and then equally divide the community estate between the parties. (Fam. Code, §§ 2550, 2552.) The "determination of the value and division of community property is a nondelegable judicial function." (*In re Marriage of Cream* (1993) 13 Cal.App.4th 81, 84.)

"The trial court possesses broad discretion to determine the value of community assets as long as its determination is within the range of the evidence presented. [Citation.] The valuation of a particular asset is a factual question for the trial court, and its determination will be upheld on appeal if supported by substantial evidence in the record. [Citation.]" (*In re Marriage of Iredale & Cates* (2004) 121 Cal.App.4th 321, 329.) In other words, so long as the court's valuation "is within the range of the evidence presented, we will uphold it on appeal." (*In re Marriage of Campi* (2013) 212 Cal.App.4th 1565, 1572; see *In re Marriage of Honer* (2015) 236 Cal.App.4th 687, 697 (*Honer*) [no error in failing to specify exact calculations relied upon in valuing family business where record "as a whole" reflected "more than ample evidence" to support trial court's decision].)

After hearing the evidence, the trial court found "that the value of the business is now worth a combination of it's [sic] assets and liabilities" and awarded the business and all its debts to Cynthia. The court's decision appears to have been based in large part on the following considerations: (1) the parties stipulated that all postseparation debts (i.e., all debts incurred after March 28, 2015) would belong to the person who acquired those debts; (2) there was "no compelling evidence" presented at

trial on the business's value or what its pre-separation debts were; and (3) Cynthia, as the spouse who managed the business, presumably had such evidence in her possession, but failed to share it with either Richard or the court. The court also found Cynthia wholly lacking in credibility. In a subsequent hearing on Cynthia's objections to the proposed judgment, the court explained its award as follows: "the value of the business and the debts thereon was a wash. This is particular[ly] because [Cynthia] failed to properly account for anything that went on in the business."

The dearth of evidence on valuation hindered the trial court's valuation of the business. The court observed "there was no compelling evidence from anybody of what this business is worth. It must have been worth something because they paid \$175,000 for it and the wife continues to borrow money to keep it going . . . [¶] The problem is . . . that there was no real accounting other than this thing that was QuickBooks without any foundation, no back-up documentation, no nothing [Richard's] counsel has objected appropriately that there's no foundation for it. [¶] I mean it's nice that people make up stuff and bring it to court and say, yeah, I made this up and nobody gets to look at the foundation for it . . . [T]hat's why there was an objection to it and that's why I sustained it."

On appeal, Cynthia points out that Richard "did not submit any evidence regarding the value of Pottery Magic . . . , nor did he proffer any evidence as to whether or not that community business was ever profitable before or after separation." This argument misses the point. It was Cynthia, not Richard, who bore the burden of proof on the value of the business and its debts. After all, Cynthia was the party who contended the business was a community asset with a negative value and who asked the court to value and divide its debts between the parties.² (*In re Marriage of Warren* (1972) 28 Cal.App.3d 777, 784 [party who asserts existence of community property debt has

² Richard, by contrast, denied the business was a community asset.

burden of producing evidence of debt, such as promissory note].) Cynthia, as the managing spouse, was also the party in possession of all records concerning the business's profitability and debts. (See *In re Marriage of Prentis-Margulis & Margulis* (2011) 198 Cal.App.4th 1252, 1270-1272 [spousal statutory duties of disclosure and accounting shift burden of proof on missing community assets to managing spouse].) Richard therefore had no obligation to offer evidence of valuation.

Cynthia misinterprets the trial court's rejection of her valuation evidence as a judicial failure to equally divide community assets. Not so. The court simply found Cynthia's valuation evidence insufficient. For example, with regard to the business's profitability, Cynthia provided her 2014 and 2015 tax returns and the business's 2016 profit and loss statement (a three-page document she personally created), which purported to show a \$6,300 loss in 2014, a \$7,000 profit in 2015, and a \$5,500 profit in 2016. But she failed to provide any balance sheets or cash flow statements for Pottery Magic. She also failed to call an expert to opine on the business's value, nor did she testify about the business's anticipated future performance or profitability.

Cynthia simply failed to persuade the trial court that Pottery Magic was as unprofitable as Cynthia suggested. To quote the court: "[I]t is obvious to me and obvious to the guy that sells cigars downstairs, that wife was running everything she could by way of personal and business expenses through the business." The court further noted in its judgment that Cynthia used the business "as a piggy bank. She ran personal expenses through it; business expenses through; payroll; and entertainment. You name it. Everything went through that account as near as the Court can tell. And that's by the way from a QuickBooks printout that [Cynthia] prepared without any further foundation . . ."

Substantial evidence supports the trial court's implicit conclusion that Cynthia engaged in creative or sloppy accounting. For example, Cynthia admitted on cross-examination that the business pays her \$400 monthly car payment; that she used her Capital One credit card to cover both business expenses *and* personal expenses, such

as attorney fees; and that she takes several thousand dollars per month out of the Pottery Magic bank account and then “replace[s] it when [she] can.”

Cynthia’s evidence concerning the amount of the business’s debts was equally nebulous. To begin with, she failed to distinguish between debts incurred pre-separation and those incurred post-separation. This distinction was relevant because the parties stipulated before trial that all debt acquired after their March 2015 separation would be their respective separate property. Citing this stipulation, the trial court concluded any post-separation business-related debts were Cynthia’s separate property. Cynthia does not offer any argument on appeal as to why the court’s interpretation of the stipulation was incorrect.³

Cynthia’s testimony and documentary evidence about the business’s pre-separation debts was vague and inconclusive at best. When asked about the amount owing on the loan taken out from James and Stacie Woodill in 2009 when she first purchased the business, Cynthia testified she was “not sure” what amount she still owed, but believed it was about \$25,000. The only documentation she provided to support this estimation, however, was a two-page table that she personally created.

As for the various loans she took out over the years to keep the business going, Cynthia identified only one *pre-separation* loan: a \$30,000 loan from Shigeru James Mihara taken out in 2014. But Cynthia never established the precise amounts she had paid on the Mihara loan pre- or post-separation, nor did she identify what amount, if any, was still owed on the Mihara loan at the time of trial in March 2017. She only

³ At the beginning of trial, Cynthia’s counsel argued the trial court should disregard the stipulation because Cynthia was not represented by counsel at the time it was entered and apparently did not understand it applied to Pottery Magic’s debts. The court rejected this argument, noting Cynthia had not brought a pretrial motion to set aside the stipulation, and explaining it would not “allow a collateral attack on a stipulation for judgment on reserved issues in the middle of trial [sic] without any noticed motion.”

produced a January 2017 e-mail that Mihara purportedly sent her, stating she had paid about \$7,700 in 2016 and the balance owed in December 2016 was about \$19,000.

With the exception of the 2009 Woodhill loan and the 2014 Mihara loan, Cynthia failed to prove any of the business's alleged debts predated her March 2015 separation from Richard. She testified about various other loans and credit card debt she or Pottery Magic incurred over the years, but that testimony did not advance her cause: she either described *postseparation* debt (e.g., an October 2015 \$20,000 loan from James Donnelly, and an October 2016 \$20,000 loan from On-Deck), or she failed to specify whether she incurred the debt before or after separation (e.g., the alleged \$40,000 in credit card debt and a \$5,000 loan from Barbara Thompson).

Cynthia also testified inconsistently about which loans were personal and which loans were business related. For example, she originally testified James Donnelly's loan was business related and then later conceded it was a personal loan.

In sum, Cynthia's evidence blurred pre- and postseparation debts, and it blurred personal and business debts.⁴ The record discloses she provided almost no supporting documentation, no custodian declarations or testimony from her creditors, and no expert testimony. Cynthia, not Richard, managed the business at all times, and therefore Cynthia presumably had access to supporting documentation reflecting the business's value and the precise amount of outstanding preseparation debt. In awarding the business to Cynthia, the trial court aptly invoked Evidence Code section 412, which provides: "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." Cynthia's failure to present credible evidence of

⁴ Cynthia's appellate briefs suffer from the same mistake. She contends on appeal she was improperly assigned "over \$120,000" in debt. However, that figure appears to be based on her testimony that Pottery Magic owed \$40,000 in credit card debt and \$80,000 on the various loans taken out — amounts that included postseparation debt.

valuation hampered the trial court's ability to calculate a precise valuation. Consequently, there was insufficient evidence from which the court could assign a precise valuation number, either positive or negative. On this record, we cannot say the court abused its discretion in concluding "the value of the business and the debts thereon was a wash" or in assigning the business and its debts to Cynthia. (See *Honer, supra*, 236 Cal.App.4th at p. 697 [court's "failure to specify exact calculations does not constitute reversible error"].)

C. *Cynthia's Breach of Fiduciary Duty*

We next turn to the trial court's finding that Cynthia breached her fiduciary duties to Richard by failing to provide him a written accounting of the business's performance. Although Cynthia interspersed various arguments against the propriety of this finding throughout her briefs, she failed to segregate and summarize those arguments under an appropriate heading or subheading as required by the rules of court. (Cal. Rules of Court, rule 8.204(a)(1)(B).) We therefore treat her arguments on the fiduciary duty ruling as forfeited. (*Dinslage v. City and County of San Francisco* (2016) 5 Cal.App.5th 368, 377-378, fn. 3 ["we address the issues raised in the headings [but] we do not consider all of the loose and disparate arguments that are not clearly set out in a heading"]; *Consolidated Irrigation Dist. v. City of Selma* (2012) 204 Cal.App.4th 187, 201 [appellant "forfeited the argument by violating the rule that requires each point be presented in an appellate brief under a separate heading"].)

D. *The Determination of Cynthia's Income*

Cynthia next challenges the sufficiency of the evidence to support the trial court's determination that she makes or "is capable of making \$4,000 a month net." She contends this finding ignored her actual income from Pottery Magic and her various part-time jobs and she has never earned anywhere close to \$4,000 per month.

"California courts have long asserted the power to impute income to supporting spouses and parents based on ability to earn income, as distinct from actual

income.” (*In re Marriage of Bardzik* (2008) 165 Cal.App.4th 1291, 1299.) We review the trial court’s decision to impute income for abuse of discretion; we may not reverse if the imputed amount is reasonable and has some tangible evidentiary foundation. (*In re Marriage of Usher* (2016) 6 Cal.App.5th 347, 361.)

Here, the trial court based its decision to impute income to Cynthia on its distrust of her claimed actual income. Indeed, the court described her income and expense declaration as a “moving target” and an “exercise in creative writing” that was “just mind boggling.”

We are not in a position to second-guess a trial court’s credibility determination on appeal (*In re Marriage of Boswell* (2014) 225 Cal.App.4th 1172, 1175), but we note in passing the evidence supports the court’s determination. For example, Cynthia claimed in her income and expense declaration that she earned an average of only \$485 per month from Pottery Magic, a figure she reportedly derived by dividing the business’s net profit (as stated in its profit and loss statement) over a period of 12 months. On cross-examination, however, Cynthia conceded the \$485 figure did *not* include the *several thousand dollars* per month she withdraws from Pottery Magic to “pay [her]self for all the work that [she does] for the business.” She explained: “I have to live. So I have to figure out a way to pay my bills and so I move money and put money back as much as I can. Otherwise, I have no way of paying my expenses, business or otherwise.”

Whatever Cynthia’s reason for taking money out of the business, such withdrawals should have been reflected in section 7 of her income and expense declaration, where she was tasked with listing all “[i]ncome from self-employment, after business expenses for all businesses.” This inaccuracy is not insignificant, as “[i]ncome and expense declarations are executed under penalty of perjury.” (*In re Marriage of Calcaterra & Badakhsh* (2005) 132 Cal.App.4th 28, 38.) The trial court was thus free to reject Cynthia’s income and expense declaration and use other substantial evidence of Cynthia’s income in its place. (*Id.* at pp. 37-38.)

The question remains whether substantial evidence supported the trial court’s imputation of \$4,000 per month in earnings to Cynthia. Instead of using Cynthia’s alleged actual income, the court concluded Cynthia “is making or capable of making a net of \$4,000 a month” as evidenced by the average amount Cynthia spent per month. Specifically, the court relied on Cynthia’s income and expense declaration, which attested that her average monthly expenses were \$4,889, no portion of which was paid by others.⁵

Citing her trial testimony that she had to take out loans just to get by, Cynthia argues loans subject to repayment generally should not be used in calculating a party’s income in awarding support. (*In re Marriage of Rocha* (1998) 68 Cal.App.4th 514, 516-517; see Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2018) ¶ 6:208.3, p. 6-144 [reasoning in *Rocha* “likely would apply to any ostensible ‘income’ item that is subject to a ‘reasonable expectation’ of repayment—e.g., *any kind of loan proceeds* probably should not be included in the guideline annual gross income computation”].)

Cynthia’s argument rests on the assumption her testimony was credible. The trial court, however, disbelieved her testimony, and we are in no position to second-guess that determination. Indeed, the evidence supports the court’s assessment. A party may not stonewall, obfuscate, or attempt to mislead the trial court concerning her income level and then complain that no evidence supports the court’s income calculation. Stated differently, what else was the court supposed to do with the limited and inconsistent income information provided by Cynthia? Under these narrow circumstances, we find no abuse of discretion in the court’s determination that Cynthia makes or “is capable of making \$4,000 a month net.”

⁵

In section 13(r) of Cynthia’s income and expense declaration, she listed her total monthly expenses as \$4,889, but the individual expenses listed in section 13(a) through 13(q) of the declaration total only \$4,097.

Cynthia also argues the trial court committed reversible error when it characterized that income as nontaxable. The court explained in a subsequent hearing this characterization was deliberate; if Cynthia spends \$4,000 per month, she presumably does so with “after-tax money.” We find no abuse of discretion in this ruling, and Cynthia cites no authority mandating a contrary result. If the \$4,000 figure had been based on Cynthia’s actual pretax earnings, we would reach a different conclusion; but it was instead based on her expenditures, which were presumably posttax.

E. *Spousal Support*

We now turn to the related issue of spousal support. If a trial court considers the mandatory guidelines of Family Code section 4320.6, as the court did here, “the ultimate decision as to amount and duration of spousal support rests within its broad discretion and will not be reversed on appeal absent an abuse of that discretion.” (*In re Marriage of Kerr* (1999) 77 Cal.App.4th 87, 93.)

Cynthia attacks the trial court’s decision to award her no spousal support on two grounds: the court was biased against her, and she did not earn \$4,000 net per month. We addressed and rejected both of these arguments above.

Cynthia observes Richard was amenable to keeping spousal support at the amount previously set by the trial court — \$1,252 per month (or about \$950 net after Cynthia paid child support to Richard). We cannot conclude the court’s decision to disregard Richard’s willingness to pay that amount per month constituted an abuse of discretion.

F. *Child Support*

Cynthia contends in passing that the incorrect calculation of her income led to an improper child support calculation. Having rejected her arguments against the imputation of income above, we likewise reject her attack on the child support award.

G. *Attorney Fees*

Finally, we consider the trial court’s ruling that each party must bear his and her own attorney fees and costs. Cynthia challenges this portion of the judgment on two grounds — judicial bias and the allegedly improper award of Pottery Magic’s debts to Cynthia — both of which we rejected above. Cynthia presents no other legal argument and cites no authority in support of her challenge to the court’s fee ruling. We therefore find no abuse of discretion. (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956 [“We are not bound to develop appellants’ arguments for them”].)

III.

DISPOSITION

The judgment is affirmed. Richard shall recover his costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

ARONSON, P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.